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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 190.

JOSEPH WILD & COMPANY, APPELLANTS,

vs.

THE PROVIDENT LIFE AND TRUST COMPANY, TRUSTEE OF THE ESTATE OF GEORGE WATKINSON & COMPANY, BANKRUPTS.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

FILED OCTOBER 30, 1907.

(20,881.)

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1 In the District Court of the United States for the Eastern District of Pennsylvania.

In the Matter of GEO. WATKINSON and IRVING WATKINSON, Individually and Trading as Geo. Watkinson & Co., Bankrupts.

In Bankruptcy. No. 1184.

Referee's Certificate on Review.

To the Honorable the Judges of the District Court of the United States for the Eastern District of Pennsylvania:

I, Theodore M. Etting, the Referee in Bankruptcy, to whom the above-entitled case was referred, do hereby certify, That in the course of the proceedings before me, there was presented by Jos. Wild & Co. a claim in the sum of $2,565.92, which amount was alleged to be due for merchandise sold upon open account, between July 19 and Oct. 8, 1901. In the absence of objection by the Trustee or creditors the claim was allowed. The Trustee thereafter filed a petition for the re-examination of the claim, alleging that on Oct. 9, 1901, on or before which date Geo. Watkinson & Co. had become insolvent, that they had paid or caused to be paid to the claimant, $634.78, and said payment was alleged to be a preference which the claimant should surrender before their claim could properly be allowed.

On April 21, 1906, testimony having been taken in the meanwhile, the Referee entered an order allowing the claim as filed, and dismissing the petition of the Trustee. Within ten days thereafter, the Trustee filed Exceptions thereto, which the Referee, after duly considering, dismissed. The Trustee feeling aggrieved by reason of this action, and desiring that the action of the Referee should be reviewed by the Judges of the District Court, within ten days, filed a petition for review, praying that the record be certified, and, in compliance with the prayer of said petition, the Referee sends up the following papers:

1. Claim of Jos. Wild & Co.
2. Petition of The Provident Life & Trust Co. Trustee, for re-examination of above claim.

2 3. Report of Referee on above petition.
4. Exceptions of Trustee to above report.
5. Report of Referee dismissing Exceptions.

The testimony taken before the Referee is not sent up because, counsel for Trustee concurred with the Referee in thinking *of* -necessary to encumber the record therewith, the Referee's finding of facts not being in question. The question certified is, whether or not, under the facts found by the Referee, the payment made Oct. 9, 1901, which in point of date was subsequent to all of the sales made by claimants of the bankrupt firm, is or is not a preference under the Bankrupt Act of Feb. 5, 1903.

The reasons which governed the Referee in making the order above referred to, and the facts as found by him, are fully set forth in his Report which, as above stated, is herewith transmitted.

All of which is respectfully submitted.

(Signed) THEODORE M. ETTING,
Referee in Bankruptcy.

Philada., May 9, 1906.

In the District Court of the United States for the Eastern District of Pennsylvania.

In the Matter of GEORGE WATKINSON & COMPANY, Bankrupts.

In Bankruptcy. No. 1184.

Report of Referee on the Claim of Joseph Wild and Company.

This claim, the amount of which is $2,565.92, is predicated upon the sale of certain merchandise on open account on four months' credit, delivered at various dates during the months of July, August, September and October, of 1901. The last delivery was made on October 8th. In the absence of objection by creditors or Trustee, the claim was allowed by the referee in the amount for which it was filed.

The Trustee has filed a petition asking for a re-examination of the claim, averring that since the last of the above transactions, the claimant received from the bankrupts a payment of $634.78, which it is contended, should be surrendered as a preference. The petition was allowed and testimony taken; from the testimony taken, supplemented by an agreement between the parties, I find the facts to be as follows:

The bankrupts became insolvent on or before January 1, 1901; the claimants had no knowledge of their insolvency, and the sales and payments hereinafter referred to, were made in the usual course of business. The claimants, on various days in the month of June, 1901, shipped certain goods to the bankrupts sold on open account on four months' credit, and on October 9, 1901, the bankrupts paid the claimants for the above goods, $634.78. At various dates between July 19, and October 8, 1901, inclusive, the claimants shipped certain other goods sold by them to the bankrupts on open account on four months' credit. The total amount due on the above sales is $2,565.92. It is for the money due on the shipments last referred to, that the claim now under consideration was filed.

I further find that the net result of all of the above transactions was to increase the estate of the bankrupts after insolvency by $2,565.92, and that if the payment made on October 9, 1901, had not been made, the estate would have been further enriched by $634.78. The provisions of the Bankrupt Act, which are germane to the question involved, are contained in Section 57*g* and Section 60*a* of the Act of 1898, previous to the amendment of February 5, 1903.

The Referee's understanding is, that the ascertainment of the

existence or non-existence of the "preference" referred to in the above Sections, is arrived at by taking both sides of the account into consideration; that it is only to the extent of net gain that the estate of a debtor can be impaired, or a greater percentage obtained than is received by other creditors of the same class. In order to determine the existence or non-existence of an alleged preference, the entire account should be regarded as a single transaction, and if all of the transactions may be regarded as one, it is difficult to understand why a payment which, if made prior to October 8, would not be preferential, becomes preferential because it is made on October 9.

Taking both sides of the account into consideration, it appears that there has been an enrichment of the estate since insolvency of $2,500 and upwards, and consequently a proportionate increase of the dividends of other creditors of the same class as the claimants, and a loss to them of the above amount, less such dividends as may be payable to them thereon.

Whatever may be the rule regarding "set offs," strictly so called, as regulated by Section 60*c*, there would seem to be no ground for the contention that the determination of the existence or non-existence of the alleged preference is dependent upon the circumstances that the last transaction in point of date is a payment. This contention was expressly overruled by Judge Lowell, by the Circuit
4 Court of Appeals for the First Circuit, and subsequently by the Supreme Court of the United States, and the rule laid down by Judge Putnam in Dickson *vs.* Wyman, approved.

Dickson *vs.* Wyman, 7 A. B. R., 186.
In re Topliff, 8 A. B. R., 141.
Jacquith *vs.* Alden, 9 A. B. R., 165.
Jacquith *vs.* Alden, 9 A. B. R., 777.
Yaple *vs.* Dahl-Millikan Grocery Co., 11 A. B. R., 596.

Counsel for Trustee has called the Referee's attention to the Colton Export and Import Company, 8 A. B. R., 257 and to Pierie *vs.* Chicago Title and Trust Co., 5 A. B. R., 814. In the case first above referred to, it appears that the claimant had originally loaned the Company $42,000; that after obtaining representation upon its Board, and after securing control to some extent at least of the insolvent corporation, he was enabled to obtain payments on account, amounting to $27,000, whilst other creditors of the same class were paid nothing. In other words, if his claim should have been allowed as filed, creditors of the same class as himself would have received a dividend of 50%, whilst the claimant would have received a dividend of 82%. It was under these circumstances that the payments received by him were held to be preferential.

In the Pierie case, it appears that the estate of the insolvent, as it existed, at the date of insolvency, had within the four months' period been diminished by a payment, and that the creditor who received the same was enabled thereby to obtain a greater percentage of his debt than any other creditor of the same class; whereas, in the present case all of the goods were sold and delivered after insolvency, and the bankrupt's estate was increased in value over and beyond

the payment received, and other creditors of the same class as the claimant proportionately benefited thereby.

The case, in the judgment of the Referee, is clearly distinguishable from the Pierie case and is on all fours with that of Jacquith *vs.* Alden, heretofore referred to.

For the reasons above stated, the petition is dismissed and the Trustee is authorized and directed to pay to Joseph Wild and Company, a dividend on $2,565.92 of the same percentage as other creditors of the same class, have heretofore received, and with two per cent thereon, that being the amount of interest on the fund allowed by the depository.

All of which is respectfully submitted.

(Signed) THEODORE M. ETTING,
Referee in Bankruptcy.

Philadelphia, April 21, 1906.

5 In the District Court of the United States for the Eastern District of Pennsylvania:

In the Matter of GEORGE WATKINSON and IRVING WATKINSON, Individually and Trading as George Watkinson & Company, Bankrupts.

In Bankruptcy. No. 1184.

Exceptions to Opinion of Referee sur Claim of Joseph Wild and Company.

And Now, this 27th day of April, A. D. 1906, comes The Provident Life & Trust Company of Philadelphia, Trustee of the estate of George Watkinson and Irving Watkinson, individually and trading as George Watkinson & Company, Bankrupts, by its attorney, and excepts to the action of the learned Referee in directing the Trustee to pay to Joseph Wild & Company, Claimants, a dividend on their claim, for the following reasons:

The claimants received a payment of $634.78 from the above bankrupts on October 9, 1901, at a time when the bankrupts were insolvent and subsequent to all credits extended by the claimants to the said bankrupts, which said payment, Trustee is advised, was preferential and is still retained by the claimants.

A. G. DICKSON,
Attorney for Trustee.

In the District Court of the United States for the Eastern District of Pennsylvania.

In the Matter of GEORGE WATKINSON and IRVING WATKINSON, Individually and Trading as George Watkinson & Company, Bankrupts.

In Bankruptcy. No. 1184.

Report on Exceptions.

To the foregoing Report certain exceptions, which are hereto annexed, have been filed. After considering the exceptions and after considering the report in the light of the exceptions, my opinion remains unchanged, and the exceptions are accordingly dismissed.

My understanding is, that in two cases tried in the Massachusetts District, one of which was carried to the Supreme Court of
6 the United States, decisions have been rendered adverse to the contention of the Trustee.

Re Topliff, 8 A. B. R., 141.

Jacquith *vs.* Alden, 9 A. B. R., 165.

The last mentioned case, after being affirmed by the Circuit Court of Appeals for the First Circuit, was appealed to the Supreme Court of the United States, and there again affirmed. (9 A. B. R., 773.)

After carefully examining the record, my understanding of the last mentioned case is, that if all of the transactions embraced in the account took place after bankruptcy, they may be considered as parts of one continuous transaction; and that if there results from taking all of the dealings with the bankrupt into the computation a debt due by the estate, the creditor may prove his claim for the amount of such debt, and receive the same dividend thereon as is paid to other creditors of the same class.

I further understand that in determining whether the transaction between any particular creditor and the bankrupt, establishes a debt in favor of the former, the Trustee cannot segregate particular payments made after insolvency, unless they relate to the payment of an indebtedness outstanding at the time of insolvency and the payment of which enabled the creditor receiving the same to obtain a greater percentage of his debt than any other creditors of the same class.

All of which is respectfully submitted.

(Signed) THEODORE M. ETTING,
Referee in Bankruptcy.

May 3, 1906.

Petition that Question be Certified by the Referee for Review by the Court.

In the District Court of the United States for the Eastern District of Pennsylvania.

In the Matter of GEORGE WATKINSON and IRVING WATKINSON, Individually and Trading as George Watkinson & Company, Bankrupts.

In Bankruptcy. No. 1184.

To Theodere M. Etting, Esq., Referee in Bankruptcy:

The Petition of The Provident Life & Trust Company of Philadelphia, Trustee of the Estate of George Watkinson and Irving Watkinson, individually and trading as George Watkinson & Company, Bankrupts, respectfully represents:

7 That on April 23, 1906, the learned Referee did file an opinion allowing the claim of Joseph Wild & Company in the sum of $2565.92; that on the twenty-seventh day of April, 1906, your Petitioner did file Exceptions thereto and that thereupon the learned Referee did on May 3, 1906, file a Report dismissing the Exceptions of your petitioner; that your petitioner is advised, believes and therefore avers, that the action of the learned Referee in dismissing said Exceptions of the Trustee and allowing the said claim of Joseph Wild & Company against the bankrupt estate was erroneous in that the said Joseph Wild & Company had within four months of the filing of the petition in bankruptcy and at a time when the said bankrupts were insolvent, received a preference, to wit: a payment on October 9, 1901, of the sum of $634.78, which payment was subsequent to all of the sales made by the said Joseph Wild & Company to the said bankrupts.

Your petitioner therefore prays that the learned Referee certify the record of this case to the District Court of the United States, for the Eastern District of Pennsylvania for review.

And your petitioner will ever pray.

THE PROVIDENT LIFE & TRUST COMPANY OF PHILADELPHIA.
Trustee of the Estate of George Watkinson and Irving Watkinson, Individually and Trading as George Watkinson & Company, Bankrupts,
By J. ROBERTS FOULKE, *Trust Officer.*

STATE OF PENNSYLVANIA,
County of Philadelphia, ss:

J. Roberts Foulke being duly affirmed according to law, doth depose and say that he is the Trust Officer of The Provident Life and Trust Company of Philadelphia, Trustee of the Estate of George Watkinson and Irving Watkinson, individually and trading as

George Watkinson & Company, Bankrupts, Petitioner herein, and that the facts set forth in the foregoing petition are just and true to the best of his information, knowledge and belief.

J. ROBERTS FOULKE.

Affirmed and subscribed to before me this 4th day of May, A. D. 1906.

I am not a stockholder, Director nor clerk of the Corporation within named.

[SEAL.] SAMUEL R. REED,
Notary Public.

My Commission expires Jan'y 30, 1909.

I hereby certify that I am not a stockholder, Director or Clerk of said Trust Company.

8 *Petition for Re-examination of the Claim of Joseph Wild and Company.*

In the District Court of the United States for the Eastern District of Pennsylvania.

In the Matter of GEORGE WATKINSON and IRVING WATKINSON, Individually and Trading as George Watkinson & Company, Bankrupts,

In Bankruptcy. No. 1184.

To Richard S. Hunter, Esquire, Referee in Bankruptcy:

The petition of The Provident Life & Trust Company of Philadelphia, Trustee of the estate of George Watkinson and Irving Watkinson, individually and trading as George Watkinson & Company, bankrupts, respectfully represents:

1. That a petition praying that George Watkinson and Irving Watkinson, individually and trading as George Watkinson & Company, be adjudged voluntary bankrupts, was filed in the said District Court of the United States, for the Eastern District of Pennsylvania, on the thirty-first day of December, 1901, and in pursuance thereof, they were so adjudged on the same day.

2. That your petitioner is the trustee of the estate of George Watkinson and Irving Watkinson, individually and trading as George Watkinson & Company, bankrupts, and has duly qualified as such.

3. That Joseph Wild & Company have filed a proof of claim against the estate of the said bankrupts in the present proceedings in the sum of $2,565.92, and that the said claim is based upon the sale and delivery of merchandise on an open account, as shown by the statement annexed to the proof of claim, between July 19 and October 8, 1901.

4. That George Watkinson and Irving Watkinson, individually and trading as George Watkinson & Company, were on or before

October 9, 1901, insolvent, and continued so up to the date of bankruptcy, and your petitioner is informed, believes, expects to be able to prove, and therefore avers that the said George Watkinson and Irving Watkinson, individually and trading as George Watkinson & Company, did pay or cause to be paid to Joseph Wild & Company on October 9, 1901, the sum of $634.78; that said sum of money was then and immediately prior thereto, the property and assets of said George Watkinson and Irving Watkinson, individually and trading as George Watkinson & Company, and that said payment did not wholly extinguish the indebtedness at the date of said payment due claimants by said George Watkinson and Irving Watkinson, individually and trading as George Watkinson & Company, but was only in liquidation *pro tanto* of said indebtedness then existing.

5. That the said payment by said George Watkinson and Irving Watkinson, individually and trading as George Watkinson & Company, to the said Joseph Wild & Company, claimants, constitutes a preference within the meaning and intent of the Bankruptcy Act, being a transfer of property, the result of which will be to enable the said claimants to obtain a greater percentage of their debt than any other of such creditors of the same class.

6. That said preference should be surrendered before the said claim is allowed.

Your petitioner therefore objects to the allowance of said claim and prays that if allowed, it be re-examined and that no dividend be paid thereon unless and until the said preference be surrendered.

And your petitioner will ever pray.

THE PROVIDENT LIFE & TRUST COMPANY OF PHILADELPHIA,
Trustee of the Estate of George Watkinson and Irving Watkinson, Individually and Trading as George Watkinson & Company, Bankrupts.

(Sd.) By J. ROBERTS FOULKE, *Trust Officer.*

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

J. Roberts Foulke being duly affirmed according to law, doth depose and say, that he is the Trust Officer of the Provident Life & Trust Company of Philadelphia, petitioner herein, and that the facts set forth in the foregoing petition are just and true as he verily believes.

(Sd.) J. ROBERTS FOULKE.

Affirmed and subscribed to before me this 7th day of June, A. D. 1904.

I am not a stockholder, director or clerk of the corporation within named.

(Sd.) PETER HACKETT,
[SEAL.] *Notary Public.*

Commission expires 3/21/07.

Order.

And Now, to wit: this — day of —— A. D. 1904, on motion of Arthur G. Dickson, Esquire, pro petitioner, and upon consideration of the foregoing petition, it is ordered that the claim of Joseph Wild & Company, in the said petition mentioned, be re-examined before me on —— 1904, at — o'clock, — M., at —— and that ten days notice of this order be given to the said claimants or their attorney by mail.

—— ——,
Referee in Bankruptcy.

Proof of Unsecured Debt.

In the District Court of the United States for the Eastern District of Pennsylvania.

In the Matter of GEORGE WATKINSON and IRVING WATKINSON, Trading as Geo. Watkinson & Co., Bankrupts.

No. —. In Bankruptcy.

At New York City, in the District of New York on the 18th day of January, A. D. 1902, came Henry Mackay, a member of the firm of Jos. Wild & Co., of New York City, in the County of New York, in the District of New York and made oath, and says that Geo. Watkinson & Co., the person by (*or* against) whom a Petition for Adjudication of Bankruptcy has been filed, was at and before the filing of said Petition, and still is, justly and truly indebted to said deponent in the sum of twenty-five hundred, sixty-five & 92 dollars; that the consideration of said debt is as follows: The sale and delivery of merchandise on open account, as shown by the attached statement, marked "Exhibit A," that no part of said debt has been paid [except —] that there are no set-offs or counterclaims to the same [except —] and that deponent has not, nor has any person by his order, or to his knowledge or belief, for his use, had or received any manner of security for said debt whatever, and that no note has been received for said debt and no judgment rendered thereon.

HENRY MACKAY,
Creditor, for and of the Firm of Joseph Wild & Co.

Subscribed and sworn to before me this 18th day of January, A. D. 1902.

[SEAL.] HOWARD MARSHALL,
Notary Public, King's Co.

Certificate filed in New York Co.

11 *Statement.*

NEW YORK, *Jan'y* 20, 1902.

Messrs. G. Watkinson & Co., Phila., Pa., to Joseph Wild & Co., Dr., 82 & 84 Worth St. and 11 & 13 Thomas St.

July	19.	To Mdse.....	220 00	
	1			
	23	.....	10 00	
	26	8/1.....	535 32	
Aug.	14	.....	364 02	
	24	.....	180 60	
Sep.	6	.....	175 08	
	11	.....	176 04	
	30	.....	178 20	
	26	.....	177 78	
Oct.	8	.....	183 30	
	"	.....	182 88	
	2	.....	182 70	
				2565 92

Settlement either by cheque or note is due on receipt of this Statement.

Notes to be drawn to your own Order and Endorsed.

Opinion of the Court.

Filed June 22, 1906.

In the District Court of the United States for the Eastern District of Pennsylvania.

In the Matter of GEORGE WATKINSON and IRVING WATKINSON, Individually and Trading as George Watkinson & Co., Bankrupts.

In Bankruptcy. No. 1184.

12 On Question Certified by Referee.

HOLLAND, *D. J.:*

The plaintiff in this case sold merchandise to the alleged bankrupts and received payments on account as set forth in the following statement:

1901.		Terms.		1901.		
Feb. 14	To Mdse.	4 Mos.	$176.58	June 29	By Cash	$176.58
June 5		"	175.38	Oct. 10	" "	634.78
						$811.36

	7	"	173.64	Balance.....	$2,565.92
	15	"	122.30		
	28	"	59.66		
	29	"	103.80		
				$811.36	
July	19	"	220.00		
	23	"	10.00		
	26	"	535.32		
Aug.	14	"	364.02		
	24	"	180.60		
Sept.	6	"	175.08		
	11	"	176.04		
	30	"	178.20		
	26	"	177.78		
Oct.	8	"	183.30		
	8	"	182.88		
	2	"	182.70		
			$3,377.28		$3,377.28

1902.
Jan. 1 To balance..... $2,565.92

It will be noticed that there are payments amounting to eight hundred and eleven and thirty-six hundredths dollars ($811.36). Goods sold from February 14, 1901 to June 29, 1901, inclusive, total the same amount.

The question certified is, whether or not Joseph Wild & Company, the claimants can prove the balance of their claim, to wit: two thousand five hundred and sixty-five and ninety-two hundredths dollars ($2,565.92), without surrendering the sum of six hundred and thirty-four and seventy-eight hundredths dollars ($634.78) received by them on October 10, 1901, which is said to be preferential.

The bankrupts were insolvent from January 1, 1901, but the first goods were delivered by the plaintiffs to them on February
13 14, 1901. The account was open long prior to four months preceding the filing of the petition in bankruptcy, and had been running from February 14, 1901, down to October 8, 1901, when the last delivery of merchandise to the bankrupts took place. Two days later, October 10, 1901, the sum of six hundred and thirty-four and seventy-eight hundredths dollars ($634.78) was paid to the plaintiffs. This was the last transaction between them, and within four months of the time of the presentation of the petition in bankruptcy. There were no subsequent credits. It was simply a payment on account of a former indebtedness, and is ruled by Colton Export & Import Co., 10 A. B. R., 14. The cases of Jaquith *vs.* Alden, 118 Fed. Rep. 270 (same case decided by the Supreme Court of the United States and reported in 9 A. B. R., 773) and Yalpe *vs.* Dahl-Millakan Grocery Co., by the same Court, reported in 11 A. B. R., 596, rule that where a debt for goods sold to the bankrupt upon a running account was all incurred within four months prior to filing

a petition in bankruptcy, and while the alleged bankrupt was insolvent; of which fact the creditor was ignorant, payment on account did not constitute preferential transfers under Section 60*a* of the Bankrupt Act, which must be surrendered under Section 57*g*, before the creditor can prove his claim, although the greater part thereof was for goods sold before the last payment was made.

In the Jaquith *vs.* Alden case, the last transaction was a purchase of goods by the bankrupts. We, therefore, hold that an increase of the bankrupts' estate, as a net result of the transaction between the bankrupt and a creditor within four months prior to filing the petition in bankruptcy, where the last transaction was a payment on account of the indebtedness, is not sufficient to relieve the creditor from surrendering this last payment as preferential, before he is permitted to prove the balance of his claim against the bankrupt's estate, when the account runs far back beyond the four months before the petition is presented and the transactions between them end with a large payment on account of the whole indebtedness. Under such circumstances it is a preferential claim and must be surrendered before the balance of the account of the creditor can be proved. Kimball *vs.* Rosenham Co., 114 Fed. Rep., 85; Sagor Bros., 9 A. B. R., 361. Where the running account, payments by the bankrupt within the four months have induced new credits, which resulted in a net increase to the estate, the creditor may be said to have once surrendered his preference by the giving of thesubsequent credit,but where, as in this case, the bankrupt, beginning far beyond the four months limit, makes a number of purchases, and then finally, within the four months, makes a large payment on account, the creditor has been preferred. To hold otherwise, would clearly give him a greater percentage of his debt than would be given to others of the same class.

Any other creditor in this estate who might have, from time to
14 time, sold goods to the bankrupt, beginning subsequent to January 1, 1901, date of insolvency, down to a time within the four months, without receiving payments on account, would certainly be in the same class with the claimant here and would receive a less per cent., if claimant be not required to surrender the alleged preference.

The order of the Referee, directing the trustee to pay to Joseph Wild & Company a dividend on two thousand five hundred and sixty-five and ninety-two *two* hundredths dollars ($2,565.92) of the same percentage as other creditors of the same class, without surrendering the said preferential payment of six hundred and thirty-four and seventy-eight hundredths dollars ($634.78) is reversed.

United States Circuit Court of Appeals for the Third Circuit.

In the Matter of GEO. WATKINSON & COMPANY, Bankrupts.

In Bankruptcy. No. 1184.

Petition for Appeal.

To the Honorable Judge of the United States District Court, for the Eastern District of Pennsylvania:

Your petitioners respectfully show that they are a partnership doing business in New York City under the firm name of Jos. Wild & Company and said firm is a creditor of Geo. Watkinson & Company, Bankrupts, who were so adjudged by the District Court of the United States for the Eastern District of Pennsylvania on the 31st day of December, 1901.

The report and opinion of the Referee allowing the claim, and also the opinion of Judge Holland reversing the order of the Referee, accurately state the facts and the legal questions involved, and the counsel have agreed that the facts stated in those opinions may be taken as The Agreed Statement of Facts and the report and opinions are hereby made a part of the record. From the decision of this Honorable Court reversing the order of the Refereee, said Jos. Wild & Company appeal, and pray that their appeal may be allowed Sept. 11, 1903.

(Signed) JOS. WILD & CO.,
By MAX L. POWELL, *Attorney.*

Appeal allowed Bond in the sum of $250 to be entered.

(Signed) JAS. B. HOLLAND, *D. J.*

15 *Assignment of Errors.*

And now comes Jos. Wild & Company, after the decision of this Court rejecting their claim, and files the following Assignment of errors on which they will reply on their appeal.

First. That the Court erred in rejecting the petitioners' claim in that the payments made within four months did not constitute a preference under Section 60a for the reason that all of the transactions between the petitioners and the bankrupts after the insolvency of the bankrupts increased the estate of the bankrupts, so that instead of the petitioners receiving more than other creditors of the same class, in case their claim is allowed, they would in fact receive less, because since the date of insolvency they had sold more goods to the bankrupts than the amount of cash received from the bankrupts.

(Signed) JOS. WILD & CO.,
By MAX L. POWELL,
Attorney.

The United States Fidelity and Guaranty Company.

Bond.

Know all men by these presents, that we, John Cartledge, John H. Berresford, Henry Mackay, and Charles F. Cartledge, co-partners trading as Joseph Wild and Company, as Principals, and The United States Fidelity and Guaranty Company, as Surety, are held and firmly bound unto The Provident Life & Trust Co., Trustee in Bankruptcy of the Estate of George Watkinson and Irving Watkinson, individually and trading as George Watkinson and Company, in the full and just sum of two hundred and fifty dollars ($250) to be paid to the said Provident Life and Trust Co., Trustee as aforesaid, his certain attorney, successors, executors, administrators or assigns, to which payment well and truly to be made, we do bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 16th day of January, in the year of our Lord one thousand nine hundred and seven (1907).

Whereas, lately at a Court in Bankruptcy, sitting in Philadelphia, in the matter of George Watkinson and Irving Watkinson, individually and trading as George Watkinson and Company, No. 1184, in Bankruptcy, an order was made refusing the motion of John Cartledge, John H. Berresford, Henry Mackay and Charles F. Cartledge, co-partners trading as Joseph Wild and Company, to
16 have confirmed the report of the Special Referee and his recommendation "that the rule for judgment against the Garnishee be made absolute and the Trustee in Bankruptcy pay out of the funds in his hands that has arisen from the sale of the property attached, the full amount of the debts, interest and costs of the attachment" and dismissing the petition of the said John Cartledge, John Berresford, Henry Mackay and Charles F. Cartledge, co-partners trading as Joseph Wild and Company, from which order they have duly appealed.

Now the condition of this obligation is such, that if the said John Cartledge, John K. Berresford, Henry Mackay, and Charles F. Cartledge, co-partners trading as Joseph Wild and Company, shall prosecute their appeal with effect and answer all damages and costs, if they fail to make their plea good, then the above obligation to be void, or else to be and remain in full force and virtue.

(Signed) JOSEPH WILD & CO. [L. S.]
JNO. CARTLEDGE. [L. S.]
JOHN H. BERRESFORD. [L. S.]
HENRY MACKAY. [L. S.]
CHARLES F. CARTLEDGE. [L. S.]

Sealed and Delivered in the presence of:
(Signed) HOWARD MARSHALL.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
(Signed) By J. WALTER ZEBLEY,
Resident Vice-President.

Attest:
(Signed) FRANK M. FLYNN,
Resident Secretary.

Agreed Statement of Facts.

It is hereby agreed between the Counsel for the Petitioners and the Counsel for the Trustee that the facts stated in the report and opinion of the Referee and as also stated by Judge Holland in his opinion, accurately state the facts and issues involved, and the facts stated in said report and opinions are to be taken in this case as the Agreed Statements of Facts.

(Signed) MAX L. POWELL,
Attorney for Jos. Wild & Co.
A. G. DICKSON,
Att'y for Provident Life & Trust Co. of Phila., Trustee of Estate of Watkinson & Co., Bankrupts.

17 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, ss:

I, William W. Craig, Clerk of the District Court of the United States, for the Eastern District of Pennsylvania, do hereby certify, that the foregoing is a true and correct copy of so much of the Record and proceedings in said Court in the Matter of the Claim of Joseph Wild & Co., Creditors in the Case of George Watkinson and Irving Watkinson, individually and trading as George Watkinson & Co., Bankrupts, In Bankruptcy, No. 1184, as by Stipulation of the parties in writing filed, (a copy of which is hereto annexed) is agreed shall constitute the Record on appeal as to this Claim.

In testimony whereof, I have hereunto affixed my hand and the Seal of said Court, this 25th day of January, A. D. 1907.

[SEAL.] WM. W. CRAIG,
Clerk, District Court, United States, Eastern District of Pennsylvania.

18 And afterwards, to wit on the twenty-first day of March, A. D. 1907, this cause being called for argument on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania, before Hon. George M. Dallas, Hon. George Gray and Hon. Joseph Buffington, Circuit Judges, and being argued by counsel for the respective parties and the court not being fully advised in the premises takes further time for the consideration thereof.

And afterwards, to wit on the thirtieth day of April, A. D. 1907, comes the parties aforesaid, by their counsel aforesaid, and the court now being fully advised in the premises renders the following opinion, to wit:

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1907.

No. 26.

JOSEPH WILD AND COMPANY, Creditors, Appellant,
v.
THE PROVIDENT LIFE AND TRUST COMPANY, Trustee of the Estate of George Watkinson and Company, Bankrupts, Appellee.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

Before Dallas, Gray, and Buffington, Circuit Judges.

GRAY, *Circuit Judge:*

This is an appeal from a decision of the district court for the eastern district of Pennsylvania, in bankruptcy. The appellant sold merchandise to the alleged bankrupts and received payment on account, as set forth in the following statement:

19

1901.		Terms.		1891.		
Feb. 14	To Mdse.	4 Mos.	$176.58	June 29	By Cash.....	$176.58
June 5		"	175.38	Oct. 10	" "	634.78
						$811.36
7		"	173.64	Balance.....		$2,565.92
15		"	122.30			
28		"	59.66			
29		"	103.80			
			$811.36			
July 19		"	220.00			
23		"	10.00			
26		"	535.32			
Aug. 14		"	364.02			
24		"	180.60			
Sept. 6		"	175.08			
11		"	176.04			
30		"	178.20			
26		"	177.78			
Oct. 8		"	183.30			
8		"	182.88			
2		"	182.70			
			$3,377.28			$3,377.28
1902.						
Jan. 1	To balance.....		$2,565.92			

For this balance, claim was made against the trustee, and the same was duly referred to the referee, before whom testimony was taken and by whom the claim was afterwards allowed. The trustee then filed a petition, asking for a re-examination, which was allowed by the referee, and from his report again allowing the claim, we take the following findings:

"The Trustee has filed a petition asking for a re-examination of the claim, averring that since the last of the above transactions, the claimant received from the bankrupts a payment of $634.78, which, it is contended, should be surrendered as a preference. The petition was allowed and testimony taken; from the testimony taken, supplemented by an agreement between the parties, I find the facts to be as follows:

The bankrupts became insolvent on or before January 1, 1901; the claimants had no knowledge of their insolvency, and the
20 sales and payments hereinafter referred to, were made in the usual course of business. The claimants, on various days in the month of June, 1901, shipped certain goods to the bankrupts sold on open account on four months' credit, and on October 10, 1901, the bankrupts paid the claimants for the above goods, $634.78. At various dates between July 19, and October 8, 1901, inclusive, the claimants shipped certain other goods sold by them to the bankrupts on open account on four months' credit. The total amount due on the above sales is $2,565.92. It is for the money due on the shipments last referred to, that the claim now under consideration was filed."

The referee, after an interesting discussion of the authorities, felt constrained to follow what he conceived to be the reasoning of Judge Putnam, in delivering the judgment of the Circuit Court of Appeals, in Dickson *et al. v.* Wyman, 49 C. C. A. 574. In that case, section 57-g of the bankrupt act was so construed as not to require a creditor to surrender partial payments received by him on account, in the usual course of business, where the transactions covered by the account between them, taken together, resulted in increasing the net indebtedness to the creditor and correspondingly increasing the bankrupt's estate. This and the case of Jaquith *v.* Alden, 189 U. S. 78, lends some support to the conclusion arrived at by the learned referee. Upon the petition of the trustee, the question was certified by the referee to the district court for review, and the order of the referee, directing the trustee to pay the claimant a dividend on $2,565.92, without surrendering the said preferential payment of $634.78, was reversed.

There is much in the natural equity of the situation that commends the contention, that, where there is an open and running account after the insolvency, in which the various transactions
21 of delivery of goods and partial payments took place openly and honestly, both sides of the account should be considered, and if the net result is an enrichment of the bankrupt's estate, partial payments, though made within four months of the filing of the petition, should not be considered as preferences, within the meaning of section 60*a* of the bankrupt act. It may be admitted that the au-

thorities are not harmonious and do not satisfactorily dispose of the precise question here presented, but, until the supreme court shall have decided otherwise, we feel constrained, by what seems to be the *ratio decidendi* of both Pirie *v.* Chicago Title & Trust Co., 182 U. S. 438, and Jaquity *v.* Aldin, 189 U. S. 78, to say that it is only where new sales succeed payments and the net result is to increase the value of the estate, that payments on a running account are not to be considered as preferential transfers under section 60*a*, to be surrendered under section 57*g*. This general view is supported by Kimball *v.* Rosenham, 52 C. C. A. 33, and by appeal of The American Woolen Co., 57 C. C. A. 412. This court, also in Gans *v.* Ellison, 52 C. C. A. 366, recognizing the hardship of treating partial payments on a running account as preferences under the act, uses this language: "If, then, a creditor innocently preferred has given return credits afterwards, he has surrendered his preference to the extent of such return credits. To effectuate justice, both sides of the account are to be considered in the case of a creditor who innocently has received preferences and *afterwards in good faith has given the debtor further credit* without security, for property which has become a part of the debtor's estate." The rule, that further credit must be given the bankrupt after the last partial payment, seems technical and artificial, where the payment, as in this case, made October 10th, was only two days after the last sales and credit on the account be-
22 tween the claimant and the bankrupt. The rule, however, has been widely recognized, is based upon sound reasoning, and has been authoritatively stated by the supreme court. We are not, therefore justified in creating an exception on the special circumstances of the present case.

The judgment of the court below is therefore affirmed.

Indorsed: U. S. C. C. A., Third Circuit. Jos. Wild & Co., appellant, *vs.* Provident Life and Trust Company, Trustee, etc. appellee. Opinion of the court. Filed April 3 1907.

23 In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1907.

No. 26.

JOSEPH WILD AND COMPANY, Appellant,
vs.
PROVIDENT LIFE AND TRUST COMPANY, Trustee, etc., Appellee.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and

decreed by this court that the decree of the said District Court in this cause, be, and the same is hereby affirmed with costs.

GEO. M. DALLAS,
Circuit Judge.

Philadelphia, May 3, 1907.

Indorsed: No. 26. March Term 1907. U. S. Circuit Court of Appeals for the Third Circuit. Joseph Wild and Company, appellant, *vs.* Provident Life and Trust Co., Trustee, etc., appellee. Order affirming decree. Entered and filed. May 3, 1907.

24 *Petition for Appeal and to Revise in Matter of Law.*

United States Circuit Court of Appeals for the Third Circuit.

Jos. WILD & Co., Creditors, Appellants,
vs.
PROVIDENT LIFE & TRUST COMPANY, Trustee of the Estate of Geo. Watkinson & Co., Bankrupts, Appellee.

To the Honorable Judges of the Circuit Court of Appeals of said District, or any of them:

And now comes Jos. Wild & Co., by their attorney, Max L. Powell, feeling themselves aggrieved by the order and decree made and entered by the above named Circuit Court of Appeals in the above entitled cause under date of April 30th, 1907, wherein and whereby it was ordered and decreed that the payment made October 1st, 1901 of $634.78 by the Bankrupts, George Watkinson & Co. to the petitioners constituted a preference under the Bankruptcy Act and should be surrendered before proof of claim on the part of said petitioner can be filed, and the petitioners pray that their appeal to the United States Supreme Court may be allowed in accordance with the provisions of Section 25*b* of the Bankruptcy Act and in accordance with General Orders XXXVI.

JOS. WILD & CO.,
By MAX L. POWELL, *Attorney.*

Appeal allowed and bond fixed in the sum of Five hundred dollars. In my opinion, the determination of the questions involved herein is essential to a uniform construction of the Bankrupt Act throughout the United States.

WILLIAM H. MOODY,
Associate Justice, Supreme Court.

May 25th, 1907.

Indorsed: Petition for Appeal. Jos. Wild & Co. appellant *vs.* Provident Life and Trust Company Trustee of the Estate of Geo. Watkinson and Co. Bankrupts, appellee. Petition for appeal and allowance. Filed July 8, 1907.

25 In the Supreme Court of the United States, October Term, A. D. 1907.

In the Matter of Estate of GEORGE WATKINSON & Co., Bankrupt.

Jos. WILD & Co., Appellant,
vs.
PROVIDENT LIFE & TRUST COMPANY, Trustee of the Estate of George Watkinson & Company, Bankrupts.

Agreement of Counsel.

Whereas an appeal was allowed in the above case from the Circuit Court of Appeals of the United States for the Third Circuit to the Supreme Court of the United States on the twenty-third day of May A. D. 1907, and the bond required approved on —— day of ——, A. D. 1907.

It is hereby stopulated and agreed by and between Max Powell, Esq., Attorney for Jos. Wild & Company and Arthur G. Dickson, Esq., Attorney for the Provident Life & Trust Company, Trustee for the Estate of George Watkinson & Company, Bankrupts that said appeal and bond so approved shall be filed in the proceedings to all intents and purposes and with full effect as if the same had been approved and filed on the twenty-fifth day of May A. D. 1907.

MAX L. POWELL,
Attorney for Jos. Wild & Company.
ARTHUR G. DICKSON,
Attorney for the Provident Life & Trust Company, Trustee.

Indorsed: U. S. Circuit Court of Appeals, Third Circuit. Jos. Wild & Co. appellant *vs.* Provident Life and Trust Co. Trustee, etc. appellee. Stipulation of Counsel. Filed August 26, 1907.

25½ UNITED STATES OF AMERICA, *ss:*

To the Provident Life & Trust Company, Trustee of the Estate of George Watkinson & Company, Bankrupts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an order allowing an appeal filed in the Clerk's office of the United States Circuit Court of Appeals for the third circuit wherein Jos. Wild & Company are appellant and you are appellee to show cause, if any there be, why the decree rendered against the said appellant in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William H. Moody, Associate Justice of the Supreme Court of the United States, this 22nd day of August in the year of our Lord one thousand nine hundred and seven.

WILLIAM H. MOODY,
Associate Justice of the Supreme Court of the United States.

PHILADELPHIA, PA., *Aug.* 26, 1907.

To the Clerk of the Supreme Court of the U. S.:

I hereby accept service of the within citation and direct the Clerk of said Court to enter my appearance for the Provident Life & Trust Company, Trustee of the estate of George Watkinson & Co., Bankrupts.

A. G. DICKSON,
By LOUIS FREYLING.

26 In the Supreme Court of the United States, October Term, 1907.

In the Matter of GEORGE WATKINSON & Co., Bankrupts.

JOHN CARTLEDGE, JOHN H. BERRESFORD, HENRY MACKAY, and CHARLES F. CARTLEDGE, Trading as Joseph Wild & Co., Appellants,

vs.

THE PROVIDENT LIFE & TRUST CO., Trustee in Bankruptcy of George Watkinson and Irving Watkinson, Individually and Trading as George Watkinson & Co., Bankrupts, Appellees.

Assignments of Error.

And now comes John Cartledge, John H. Berresford, Henry Mackay and Charles F. Cartledge, trading as Joseph Wild & Co., and files herein the following assignments of error, upon which they will rely upon their appeal from the judgment of the United States Circuit Court of Appeals for the Third Circuit, in the above entitled case, being a certain judgment entered therein on the Third day of May, A. D. 1907, on the claim of Joseph Wild & Co., which judgment disallowed the claim of Joseph Wild & Co., under Section 57*a* of the bankruptcy act unless an alleged preference was surrendered as provided for in Section 57*g* of said act.

The appellants assign as error the following:

1. For that the United States Circuit Court of Appeals for the Third Circuit erred in holding that appellants' claim as set out in the record showed a preference under the bankruptcy act of 1898.

2. For that the United States Circuit Court of Appeals for the Third Circuit erred in holding that the payment by George Watkinson and Irving Watkinson, trading as George Watkinson & Co., bankrupts, to the appellants on October 10th, 1901 of Six hundred and thirty-four dollars and seventy-eight cents ($634.78)
27 operated as a preferential transfer under Section 60*a* of the bankruptcy act of 1898, which must be surrendered under Section 57*g* of said act before the claim of the appellants be allowed and entered judgment affirming the decree of the District Court disallowing appellants' claim.

3. For that the United States Circuit Court of Appeals for the Third Circuit erroneously decided that further credit must be given the bankrupts after the last partial payment in order to avoid a

preferential transfer where the record in this case shows the transaction between the appellants and George Watkinson & Co., bankrupts, was a running account and since the insolvency of George Watkinson & Co., bankrupts, the several sales to and payments by said bankrupts produced a net gain and increase to said bankrupts' estate and a loss to the appellants.

4. For that the United States Circuit Court of Appeals for the Third Circuit erred in disallowing the claim of appellants.

Wherefore in order that the foregoing assignments of error may be and appear of record the said Joseph Wild & Co., present the same to the court and prays that such disposition may be made thereof as in accordance with law and the statutes of the United States in such cases made and provided, and the said Joseph Wild & Co., pray that said judgment of said United States Circuit Court of Appeals for the Third Circuit may be reversed and the said cause remanded to the District Court with directions to enter an order allowing the claim of Joseph Wild & Co.

HARRIS S. SPARHAWK,
MAX L. POWELL,
Attorneys for Joseph Wild & Co.

(Endorsed:) Supreme Court of the United States. October Term 1907. *In re* George Watkinson & Co., Bankrupts. Joseph Wild & Co., Appellants *vs.* The Provident Life & Trust Co., Trustee, Appellee. Assignments of Error. Harris S. Sparhawk, Atty for Joseph Wild & Co., Appellants. Filed, September 20, 1907.

28 Duplicate.

Know all men by these presents:

The we, James Cartledge, John H. Berresford, Henry Mackay and Charles F. Cartledge, co-partners trading as Joseph Wild and Company, as Principals, and The United States Fidelity and Guaranty Company, a Corporation organized under the laws of the State of Maryland, and having an office and usual place of business at No. 86 Liberty Street, in the City of New York, as Surety, are held and firmly bound unto The Provident Life and Trust Company of Philadelphia, Trustee in Bankruptcy of the estate of George Watkinson, and Irving Watkinson, individually, and trading as George Watkinson and Company, Bankrupts, in the full and just sum of Five Hundred Dollars ($500.00) to be paid to the said The Provident Life and Trust Company of Philadelphia, Trustee as aforesaid, its certain attorney, executors, administrators or assigns, to which payment well and truly to be made, the said Principals and the said Surety bind themselves, their heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with their seals, and dated this 23rd day of July, in the year of our Lord one thousand nine hundred and seven.

Whereas, lately at a term of the United States Circuit Court of Appeals, for the Third Circuit, in a suit depending in said Court, between the said John Cartledge, John H. Berresford, Henry Mackay

and Charles F. Cartledge, co-partners trading as Joseph Wild and Company, Creditors, Appellant, and The Provident Life and Trust Company of Philadelphia, Trustee of the Estate of George Watkinson and Irving Watkinson, individuall*t*, and trading as George Watkinson and Company, Bankrupts, Appellee, a decree was rendered against the said John Cartledge, John H. Berresford, Henry Mackay and Charles F. Cartledge, co-partners trading as Joseph Wild and Company, and the said John Cartledge, John H. Berresford,
29 Henry Mackay and Charles F. Cartledge, co-partners trading as Joseph Wild and Company, having obtained an order allowing an appeal and filed a copy thereof in the Clerk's office of the said Court to reverse the decree in the aforesaid suit, and a citation directed to the said The Provident Life and Trust Company of Philadelphia, Trustee as aforesaid, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within — days from the date thereof.

Now, the condition of the above obligation is such, that if the said John Cartledge, John H. Berresford, Henry Mackay and Charles F. Cartledge, co-partners as Joseph Wild and Company, shall prosecute their appeal to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void else to remain in full force and virtue.

JNO. CARTLEDGE. [SEAL.]
JOHN H. BERRESFORD. [SEAL.]
HENRY MACKAY. [SEAL.]
CHAS. F. CARTLEDGE. [SEAL.]
THE UNITED STATES FIDELITY AND GUARANTY COMPANY,
By SYLVESTER J. O'SULLIVAN, *Manager.*

Attest: GEORGE E. HAYES,
Attorney-in-Fact.

Sealed and delivered in the presence of
HOWARD MARSHALL.

Sept. 16th, 1907.
Approved.
W. H. MOODY, *A. J., S. C.*

30 *Affidavit, Acknowledgement, and Justification by the United States Fidelity and Guaranty Company.*

STATE OF NEW YORK,
County of New York, ss:

Before me personally came Sylvester J. O'Sullivan, known to me to be the Manager of The United States Fidelity and Guaranty Company, the corporation described in which executed the annexed bond of —— as surety thereon, who being by me duly sworn, deposes and says that he resides in the City of New York, State of New York, and that he is the manager of said The United States Fidelity and Guaranty Company, and knows the corporate seal thereof; that said Company is duly and legally incorporated under the laws of the State of Maryland; that said Company has complied with the pro-

visions of the Act of Congress of August 13, 1894, allowing certain corporations to be accepted as surety on bonds that the seal affixed to the annexed bond of —— is the corporate seal of said The United States Fidelity and Guaranty Company, and was thereto affixed by order and authority of the Board of Directors of said Company, and that he signed his name thereto by like order and authority as Manager of said Company; and that he is acquainted with George E. Hayes, and knows him to be Attorney in Fact of said Company; and that the signature of said George E. Hayes, subscribed to said bond is the genuine handwriting of said
31 George E. Hayes, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution, exceeds its claims, debts and -iabilities, of every nature whatsoever by more than the sum of one million dollars ($1,000,000.00).

SYLVESTUS J. O'SULLIVAN.

Sworn to, acknowledged before me, and subscribed in my presence this 11 day of Sept. 1907.

DANIEL C. DEASY,
Notary Public, New York County.

(Endorsed:) John Cartledge, John H. Berresford, Henry Mackay and Charles F. Cartledge, co-partners trading as Joseph Wild and Company and The United States Fidelity and Guaranty Company, to The Provident Life and Trust Company of Philadelphia. Bond. Filed September 21, 1907.

32 UNITED STATES OF AMERICA, *ss:*

To the Provident Life & Trust Company, Trustee of the Estate of George Watkinson & Company, Bankrupts, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to an order allowing an appeal, filed in the Clerk's Office of the United States Circuit Court of Appeals for the third circuit wherein Jos. Wild & Company are Appellant and you are Appellee, to show cause, if any there be, why the decree rendered against the said Appellant in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable William H. Moody, Associate Justice of the Supreme Court of the United States, this 22d day of August, in the year of our Lord one thousand nine hundred and seven.

WILLIAM H. MOODY,
Associate Justice of the Supreme Court of the United States.

PHILADELPHIA, PA., *Aug.* 26, 1907.

To the Clerk of the Supreme Court of the U. S.:

I hereby accept service of the within citation and direct the Clerk of said Court to enter my appearance for the Provident Life & Trust

Company, Trustee of the estate of George Watkinson & Co., Bankrupts.

A. G. DICKSON,
By LOUIS FREYLING.

33 In the Supreme Court of the United States, October Term, 1907.

In the Matter of GEORGE WATKINSON & Co., Bankrupts.

JOHN CARTLEDGE, JOHN H. BERRESFORD, HENRY MACKAY, and CHARLES F. CARTLEDGE, Trading as Joseph Wild & Co., Appellants,

vs.

THE PROVIDENT LIFE AND TRUST CO., Trustee in Bankruptcy of George Watkinson and Irving Watkinson, Individually and Trading as George Watkinson & Co., Bankrupts, Appellee.

It is hereby stipulated by and between Joseph Wild & Co., by Max L. Powell and Harris S. Sparhawk, their counsel, and The Provident Life & Trust Co., Trustees of the Estate of George Watkinson & Co., bankrupts, by Arthur G. Dickson, its counsel, that the following facts may be admitted as proved in the proceedings now to be heard in the above court.

That Joseph Wild & Co., claimants, sold and delivered merchandise to George Watkinson & Co., bankrupts, and received payments on account on the dates, of the values, on the terms, and in the amounts set forth in the following statement:

1901.	Terms.			1901.		
Feb. 14th	To Mdse.	4 mos.	$176.58	June 29th	By cash..	$176.58
June 5th	"	"	175.38	Oct. 10th	" ..	634.78
						811.36
7th	"	"	173.65	Balance.....		2565.92
15th	"	"	122.30			
28th	"	"	59.66			
29th	"	"	103.80			

34

1901.	Terms.				
July 19th	To Mdse.	4 mos.	220.00		
23rd	"	"	10.00		
26th	"	"	535.32		
Aug. 14th	"	"	364.02		
24th	"	"	180.60		
Sept. 6th	"	"	175.08		
11th	"	"	176.04		
30th	"	"	178.20		
26th	"	"	177.78		
Oct. 8th	"	"	183.30		
8th	"	"	182.88		
2nd	"	"	182.70		
			$3377.28		$3377.28
1902.					
Jan. 1st.	To balance.....		$2565.92		

That George Watkinson & Co. became insolvent on or before January 1st, A. D. 1901. A petition praying that they be adjudged voluntary bankrupts was filed on December 31st, 1901, and they were so adjudicated that same day.

That Joseph Wild & Co. had no knowledge of the insolvency of the bankrupts and the sales and payments hereinbefore set out were made in the usual course of business and constituted an open and running account between claimants and bankrupts. That there was no intent on the part of the bankrupts to prefer Joseph Wild & Co.

That the claim of Joseph Wild & Co. was allowed by the referee in the sum of $2565.92. Subsequently, the District Court of the United States for the Eastern District of Pennsylvania reversed the action of said referee, and on appeal to the United States Circuit Court of Appeals for the Third Circuit, the judgment of the District Court was affirmed.

MAX L. POWELL,
HARRIS S. SPARHAWK,
Attorney- for Joseph Wild & Co.
ARTHUR G. DICKSON,
Attorney for The Provident Life & Trust Co., Trustee of George Watkinson & Co.

(Indorsed:) In the Supreme Court of the United States, October Term 1907. In the matter of George Watkinson & Co., Bankrupts. John Cartledge, John H. Berresford, Henry Mackay and Charles F. Cartledge, trading as Joseph Wild & Co., Appellants *vs.* The Provi-
dent Life and Trust Co., Trustee in Bankruptcy of George
35 Watkinson and Irving Watkinson, Individually and trading as George Watkinson & Co., Bankrupts, Appellee. Stipulation of Facts. Filed October 5, 1907.

36 UNITED STATES OF AMERICA, *sct:*

I, William H. Merrick, Clerk of the United States Circuit Court of Appeals for the Third Circuit, do hereby certify that the foregoing pages from one to thirty-five inclusive, to contain a full, true, complete and faithful copy of the original transcript of record in the case of John Cartledge, John H. Berresford, Henry Mackay and Charles F. Cartledge, trading as Joseph Wild & Co., Appellants, against The Provident Life and Trust Co. Trustee in Bankruptcy of George Watkinson and Irving Watkinson, Individually and trading as George Watkinson & Co., Bankrupts, Appellee, on file and now remaining among the records of the said court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court at Philadelphia, this seventh day of October, in the year of our Lord one thousand nine hundred and

nine, and of the Independence of the United States the one hundred and thirty-second.

[Seal of the United States Circuit Court of Appeals, Third Circuit.]

WM. H. MERRICK,
Clerk U. S. Circuit Court of Appeals, Third Circuit.

Endorsed on cover: File No. 20,881. U. S. circuit court appeals, 3d circuit. Term No. 190. Joseph Wild & Company, appellants, *vs.* The Provident Life and Trust Company, trustee of the estate of George Watkinson & Company, bankrupts. Filed October 10th, 1907. File No. 20,881.

IN THE

Supreme Court of the United States

October Term, 1908. No. 190

JOSEPH WILD & CO.

Appellants

VS.

THE PROVIDENT LIFE & TRUST COMPANY, TRUSTEE OF THE ESTATE OF GEORGE WATKINSON & CO., BANKRUPTS

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF JOSEPH WILD & CO., APPELLANTS

I

George Watkinson & Co. became insolvent on or before January 1, 1901.

Joseph Wild & Co., appellants, sold and delivered merchandise to said insolvents between February 14, 1901, and October 8, 1901, inclusive, amounting to $3377.28, and received payments on account on June 29 and October 10, 1901, aggregating $811.36, leaving a balance of $2565.92.

A petition praying that George Watkinson & Co. be adjudged voluntary bankrupts was filed on December 31, 1901, and they were so adjudicated that same day.

The appellants filed a claim against the said bankrupts' estate, and the said claim was allowed by the Referee in the

sum of $2565.92. Exceptions were filed to the claim by the trustee of the bankrupts, contending that the payment by the bankrupts to the appellants on October 10, 1901, amounting to $634.78 was a preferential payment. These exceptions were dismissed. The trustee then had the record certified to the District Court of the United States for the Eastern District of Pennsylvania. The latter tribunal reversed the action of the Referee; whereupon Joseph Wild & Company appealed to the Circuit Court of Appeals, of the Third Circuit, and the last named Court affirmed the action of the District Court. The matter now appears in the Supreme Court of the United States by appeal from the Circuit Court of Appeals.

The question involved is whether in a set of transactions consisting of sales by a creditor and payments by the debtor, all of which occur and are comprised within a period of insolvency of the debtor and constituting a running account between the creditor and the debtor, the last transaction being a payment on account, there being no knowledge on the part of the creditor of insolvency of the debtor and the sales and payments being made in the usual course of business and no intent on the part of the debtor to prefer the creditor, is the last payment because made within four months of an adjudication in bankruptcy of the debtor, a preferential payment under Section 60a of the Bankruptcy Act to be surrendered under Section 57g of said Act? The agreed facts for determination appear on pages 25 and 26 of the transcript.

II

Appellants' assignments of error are as follows:

1. For that the United States Circuit Court of Appeals for the Third Circuit erred in holding that appellants' claim as set out in the record showed a preference under the Bankruptcy Act of 1898.

2. For that the United States Circuit Court of Appeals for the Third Circuit erred in holding that the

payment by George Watkinson and Irving Watkinson, trading as George Watkinson & Co., bankrupts, to the appellants on October 10, 1901, of Six hundred and thirty-four dollars and seventy-eight cents ($634.78) operated as a preferential transfer under Section 60a of the Bankruptcy Act of 1898, which must be surrendered under Section 57g of said act before the claim of the appellants be allowed and entered judgment affirming the decree of the District Court disallowing appellants' claim.

3. For that the United States Circuit Court of Appeals for the Third Circuit erroneously decided that further credit must be given the bankrupts after the last partial payment in order to avoid a preferential transfer where the record in this case shows the transaction between the appellants and George Watkinson & Co., bankrupts, was a running account and since the insolvency of George Watkinson & Co., bankrupts, the several sales to and payments by said bankrupts produced a net gain and increase to said bankrupts' estate and a loss to the appellants'.

4. For that the United States Circuit Court of Appeals for the Third Circuit erred in disallowing the claim of appellants.

III

ARGUMENT

The appellants were wholly ignorant of the insolvency of the bankrupts and there was no intent on the part of the bankrupts to prefer appellants. **After** insolvency and before bankruptcy, the bankrupts' estate by reason of their dealings with appellants was enriched to the amount of $2565.92.

To this extent it presents exactly the same situation found in Jaquith vs. Alden, 189 U. S. 78 (1903). In that case the Court said:

> "In the present case all the rubber was sold and "delivered after the bankrupts' property had actually "become insufficient to pay their debts, and their estate "was increased in value thereby to an amount in excess "of the payments made. The account was a running

> "account, and the effect of the payments was to keep "it alive by the extension of new credits, with the net "result of a gain to the estate of $546.89, and a loss "to the seller of that amount, less such dividends as "the estate might pay."

This was not the fact in the case of Pirie vs. Chicago Title & Trust Co., 182 U. S. 438 (1901). In the Pirie case, the estate of the insolvent as it existed at the date of insolvency was diminished by the payment. Not only will this appear from an examination of the agreed state of facts in the Pirie case, but Mr. Chief Justice FULLER so declared in the case of Jaquith vs. Alden, *supra,* for he said in referring to the Pirie case:

> "The estate of the insolvent as it existed at the "date of the insolvency was diminished by the pay- "ment, and the creditor who received it was enabled "to obtain a greater percentage of his debt than any "other of the creditors of the same class."

The attention of the Court is respectfully directed to the importance that is given to the **date** of insolvency in these last two cases, for our contention is that the only method of determining whether or not a particular creditor has obtained a greater percentage of his debt than any other creditor of the same class is to ascertain if during a period of insolvency the bankrupts' estate has been enriched by reason of the transactions in their **entirety.** The running account between the insolvent and the creditor may be variable, and during insolvency may show at times a diminishing of the estate; but if in the entirety of the transactions the estate is enriched, then the payments are not preferential. To ascertain this fact, the Court is not to segregate and treat each transaction as self-existent and independent. In Jaquith vs. Alden, *supra,* a running account, the last payment of $644.28 was followed by a sale amounting to $10.40, effort was made by the trustee to construe the payment as a preference and the sale a valid set off under

Section C of the Bankruptcy Act, the difference being preferential. You ruled in these words (page 83):

> "The law does not demand the segregation of the "purchases into independent items so as to create dis- "tinct pre-existing debts. * * * All the material "was sold and delivered after August 15th and neither "of the items can properly be singled out as consti- "tuting outstanding indebtedness payment of which "operated as a preference."

The argument will probably be advanced that there is a distinction where the last transaction is a payment by the insolvents. This argument is unsound both in principle and in practical application, for if the transactions in the Jaquith vs. Alden case, *supra*, are analyzed, it will appear that the last payment amounting to $644.28 was followed by a sale amounting to only $10.40, a clean loss to the estate of $639.88. If the relative position of credit and payment is to control, then in that case we would have the artificial and unreasonable result of a payment of $644.28 justified because of a sale of $10.40 made afterward.

In the case now before the Court no sale was made after the payment. It must be remembered it was payment on a running account. The first payment by insolvents was followed by sales, all were within a period of insolvency, and are to be considered as parts of one continuous *bona fide* transaction kept alive by extension of new credits.

The object of the bankrupt act, so far as creditors are concerned, is to secure equality of distribution among them of the property of the bankrupt. Such object could not be secured if there were no provisions against preferences. Pirie vs. Chicago Title & Trust Co., *supra*. A preference is a transfer of property which enables one of the creditors of a bankrupt to obtain a greater percentage of his debt than any other creditors of the same class. Where a running account, with no knowledge of insolvency on the part of the creditor, and no intent to prefer, comprised within a period of insolvency, shows a net gain to the estate and a

consequent loss to the creditor, that creditor has not been preferred, for that creditor does not receive a greater percentage of his debt than other creditors in the same class.

Judge GRAY, who delivered the opinion for the Circuit Court of Appeals in the present case, admits that his construction "seems technical and artificial" and that "there is much in the natural equity of appellants' contention."

We submit that appellants' case is not only equitable, but is based on sound reason, and a true interpretation of the case of Jaquith vs. Alden referred to.

We ask that the order of the Circuit Court of Appeals affirming the decree of the District Court be reversed and the case remanded with direction that appellants' claim be allowed in the amount filed.

MAX L. POWELL
HARRIS S. SPARHAWK
Attorneys for Joseph Wild & Co., Appellants

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No. 190. OCTOBER TERM, 1908.

Office Supreme Court, U.
FILED.
MAR 8 1909
JAMES H. McKENNE
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IN THE

Supreme Court of the United States

Joseph Wild & Company, Appellants,

vs.

The Provident Life & Trust Company, Trustee of the Estate of George Watkinson & Company, Bankrupts, Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

APPELLEE'S BRIEF.

ARTHUR G. DICKSON,
For Appellee.

DICKSON, BEITLER & MCCOUCH,
Of Counsel.

Allen, Lane & Scott, Prs., Phila.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1908. No. 190.

Joseph Wild & Co., Appellants,

vs.

The Provident Life and Trust Company, Trustee of the Estate of George Watkinson & Co., Bankrupts, Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

APPELLEE'S BRIEF.

I. STATEMENT OF FACTS.

Briefly stated the facts of the present case are as follows:—

The bankrupts were insolvent during the entire time covered by the transactions between them and the creditor, but the latter had no knowledge of their insolvency. On February 14th, 1901, a sale was made to the bankrupts and payment therefor was received on June 29th. Between June 5th and 29th, sales were made amounting to six hundred thirty-four dollars and seventy-eight cents

($634.78). Between July 19th and October 8th, there were other sales amounting to two thousand five hundred sixty-five dollars and ninety-two cents ($2565.92). The first of these amounts, namely six hundred thirty-four dollars and seventy-eight cents ($634.78) was paid to the creditor, after the date of all of the sales, on October 10th. His claim was filed for the amount of two thousand five hundred and sixty-five dollars and ninety-two cents ($2565.92), and the position of the trustee in bankruptcy is that it should not be allowed (Bankruptcy Act of 1898, Sec. 57 G) unless the payment of six hundred thirty-four dollars and seventy-eight cents ($634.78) is surrendered, in which case the claim would be increased by that amount. The creditor's claim was allowed by the Referee, but the District Judge of the Eastern District of Pennsylvania adopted the trustee's view and the Circuit Court of Appeals for the Third Circuit has affirmed the judgment.

ARGUMENT.

The proceedings in this estate began in 1901. In 1903 the Bankrupt Act was amended so as to eliminate all questions of so-called "innocent preferences" and the question now before this court is no longer of any importance except to the creditor who seeks to retain the payment received on account of the bankrupts' indebtedness and to the trustee, representing the other creditors who have not been so fortunate.

When this court decided the case of Pirie *vs.* Chicago Title & Trust Co., 182 U. S., 438 (1901), it was enforcing the Act as it then read (Sec. 60 A.):—

> "A person shall be deemed to have given a preference if, being insolvent, he has procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or trans-

fer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

This language, applicable to the present case, was held by this court to apply to creditors who have innocently received preferences.

In order to avoid the effect of the rule thus laid down, an effort was early made to give to an innocently preferred creditor the advantage given by Section 60c of the Act to one who had received a guilty and voidable preference, namely, the right to set off subsequent credits against the amount which would otherwise have to be surrendered. In several cases it was accordingly held that an innocently preferred creditor should not be placed in a worse position than one who had received a guilty preference, as, by the new credits which he had given to his debtor, the creditor had, in effect, returned payments which were otherwise preferential. Some of these cases are:—

McKay *vs.* Lee, 105 Fed., 923, S. C., 5 A. B. R., 267 (1901), Circuit Court of Appeals for the Seventh Circuit, Grosscup, J.;

In re Ryan, 105 Fed., 760, S. C., 5 A. B. R., 396 (1900), District Court, Northern District of Illinois, Kohlsaat, District Judge;

In re Southern Overall Mfg. Co., 111 Fed., 518, S. C., 6 A. B. R., 633 (1901), District Court, Northern District of Georgia, Newman, District Judge, affirmed under the name of Kahn *vs.* Export & Com. Co., 115 Fed., 290, S. C., 8 A. B. R., 157 (1902);

In re E. O. Thompson's Sons, 6 A. B. R., 663 (1901), District Court, Eastern District of Pennsylvania, Hunter, Referee, affirmed in 7 A. B. R., 214 (1902), McPherson, District Judge, affirmed by Circuit Court of Appeals for the Third Circuit under the name of Gans *vs.* Ellison, 114 Fed., 734, S. C., 8 A. B. R., 153 (1902);

Peterson *vs.* Nash Brothers, 112 Fed., 311, S. C., 7 A. B. R., 181 (1901), Circuit Court of Appeals for the Eighth Circuit, Adams, District Judge;

In re Beswick, 7 A. B. R., 395 (1900), District Court, Northern District of Ohio, Remington, Referee.

As soon as the theory that an innocently preferred creditor was entitled to the privilege of setting off against the payments received by him, the subsequent credits which he had given to his debtor, had begun to make headway, there appeared a further theory which was but the logical outcome of it, namely, that, where credits succeeded payments and the credits during the period of insolvency exceeded the payments made during the same period, it was not necessary for the creditor to make any surrender before proving his claim.

This view appears to have been first stated in the case of *In re* Jourdan, generally referred to as that of Dickson *vs.* Wyman, which is reported in 111 Fed. Rep., 726, S. C., 7 A. B. R., 186 (1901). The opinion of the Circuit Court of Appeals for the First Circuit in that case was delivered by Putnam, Circuit Judge. That case was one where numerous payments and sales had been made, the sales exceeding the payments, and the last payment, on August 8th, was succeeded by a sale on August 10th. It will be noticed, therefore, that that case was one in which, if at all, the principle could be applied.

The same view was adopted in the following cases:—

Morey Mercantile Co. *vs.* Schiffer, 114 Fed. 447, S. C., 7 A. B. R., 670 (1902), Circuit Court of Appeals, Eighth Circuit, Sanborn, Circuit Judge;

In re Kimball vs. Rosenham Co., 114 Fed. Rep., 85, S. C., 7 A. B. R., 718 (1902), Circuit Court of Appeals, Eighth Circuit, Sanborn, J.

In re Sagor & Bro., 121 Fed., 658, 9 A. B. R. 361 (1903), Circuit Court of Appeals, Second Circuit, Lacombe, Circuit Judge.

When, finally, the question reached this court in the case of Jaquith *vs.* Alden, 189 U. S., 78 (1903), the views of the Circuit Courts of Appeals for the First, Second, Third and Eighth Circuits were adopted and it was ruled that "Payments on a running account, *where new sales succeed payments,* and the net result is to increase the value of the estate, do not constitute preferential transfers under Section 60a."

On one subsequent occasion the question was raised in this court in the case of Yaple *vs.* Dahl-Millakan Grocery Co., 193 U. S., 526 (1904). This case involved a question certified by the Circuit Court of Appeals for the Sixth Circuit, which stated that sales and payments had been made during the four months prior to the bankruptcy, the sales exceeding the payments. The question did not cover the whole period of insolvency and it was not stated whether the payments or sales were last in point of time, the increase during the period named alone being called to the attention of this court. It appears, however, from the paper book of the appellant in that case, that the last of the transactions between the parties was a sale from the creditor to the bankrupt and not a payment from the bankrupt to the creditor. The case appears to have had no effect upon the law, this court stating that the question was answered by the case of Jaquith *vs.* Alden, *supra.*

The history which has thus briefly been sketched shows that the return of the innocently received preference by subsequent credits was an essential part of the theory which permitted the retention of the payments that had been received by the creditor during insolvency and within four months of bankruptcy. It is true that, in the Jaquith *vs.* Alden case, the sale which was the last of the transactions was not large enough to be by itself a return of the payment just previously received, but it was at least a partial return of that payment. Furthermore, the payments and sales were very closely inter-related, so that this court was able to regard all of the transactions as one continuing course of dealing, where payments had had the effect of inducing new sales. When the sales and payments in the Jaquith *vs.*

Alden case are examined, it is seen that there were, first, two sales, then two payments; next three sales, then a payment, and, lastly, a sale. The payments, therefore, kept the account alive and helped to increase the estate by inducing the extension of additional credits.

In the present case, the first sale was paid for and then there followed a number of sales. If the transactions had stopped there, this case would not be before this court. There was, however, a subsequent payment of a part of the account. This payment did not induce any subsequent credits; it was not so intermingled with other payments and sales as to entitle the creditor to ask that it be taken as part of a continuing transaction by which the estate was benefited. Its only effect was to reduce the estate, to take a part of the assets which then belonged to all of the creditors of the bankrupts and to give it to one of them. No reasoning, however plausible, can rob this payment of that effect and it was, therefore, under the Bankruptcy Act of 1898, a preference.

The decision of the Circuit Court of Appeals in this case was in accord with its own previous opinion in the case of Gans *vs.* Ellison, 114 Fed., 734, S. C., 8 A. B. R., 153 (1902), in which it was said:—

> "If, then, a creditor innocently preferred has given return credits afterwards he has surrendered his preference to the extent of such return credits. To effectuate justice, both sides of the account are to be considered, in the case of a creditor who innocently has received preferences, and afterwards in good faith has given the debtor further credit, without security, for property which has become a part of the debtor's estate."

The attention of this court is likewise respectfully called to the language of Sanborn, Circuit Judge, in delivering the opinion of the Circuit Court of Appeals for the Eighth Circuit, in the case of Kimball *vs.* Rosenham Co., 114 Fed., 85, S. C., 7 A. B. R., 718 (1902), and to

that of Lacombe, Circuit Judge of the Circuit Court of Appeals for the Second Circuit, in the case of Colton Export and Import Company, 121 Fed., 63, S. C., 10 A. B. R., 14 (1903).

In the former case, Judge Sanborn said:—

> "It may be said that before the $850 was paid, the claim of the Rosenham Company was $2728.13, that after its payment it was only $1878.13, and that the moment the payment was made the creditor had secured thereby a preference. *This would undoubtedly have been true if the account and the transaction had closed there.*"

And in the latter case, Judge Lacombe said:—

> "Appellant calls attention to the circumstance that all the loans were made to the bankrupt while it was insolvent, but there is no distinction recognized in the Act between claims which accrued before and after insolvency. Section 60c (Act July 1st, 1898, Chap. 541, 30 Stat., 562, U. S. Com. St., 1901, page 3446), does not apply, because the creditor has not given the debtor further credit after receiving a preferential payment. The facts are not similar to those in the line of cases which are cited *in extenso in re*. Sagor, *supra*. Payments made by the debtor have not been succeeded by new extensions of credit, and there is no room for the argument that it should be assumed that the payment induced the credit, or that the transaction is the same as if the debtor paid part cash for a new lot of goods and obtained new credit only for the balance."

Although Circuit Judge Gray, in delivering the opinion of the Circuit Court of Appeals for the Third Circuit in this case, admitted "that the authorities are not harmonious and do not satisfactorily dispose of the precise question here presented," it is submitted that, when the cases are carefully examined, there is no real difference

of opinion between the judges of different circuits. In no case, with the exception of *In re.* Topliff (114 Fed., 323 S. C., 8 A. B. R., 141 (1902), a decision by the District Court of Massachusetts) has there been a decision enabling a creditor, whose last transaction with the bankrupt during insolvency and within four months of bankruptcy, has been the receipt of a payment, to retain such payment. In every other case in which the creditor has been permitted to retain payments received during insolvency and within the four months' period, those payments have been succeeded by new credits extended to the bankrupt. As has already been stated, the only effect of the payment in the present case was to reduce the estate and it was, therefore, a preference.

The judgment of the District Court, affirmed by the Circuit Court of Appeals, should be allowed to stand.

ARTHUR G. DICKSON,
For Appellee.

DICKSON, BEITLER & McCOUCH,
Of Counsel.

JOSEPH WILD & COMPANY *v.* PROVIDENT LIFE AND TRUST COMPANY, TRUSTEE OF WATKINSON & COMPANY, BANKRUPTS.

APPEAL FROM THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 190. Argued April 29, 1909.—Decided May 24, 1909.

Where a creditor, who had no knowledge of the debtor's insolvency, has a claim upon an open account for goods sold and delivered during the period of four months before the adjudication in bankruptcy, the account being made of debts and credits, leaving a net amount due from the bankrupt estate, the payments made under such circumstances do not constitute preferences which the creditor is bound to surrender before proving his claim. *Yaple* v. *Dahl-Millikan Grocery Co.*, 193 U. S. 526, followed; *Pirie* v. *Trust Co.*, 182 U. S. 438, distinguished.

153 Fed. Rep. 562, reversed.

THE facts are stated in the opinion.

Mr. Max L. Powell and *Mr. Harris S. Sparhawk* for appellants:

The appellants were wholly ignorant of the insolvency of the bankrupts and there was no intent on the part of the bankrupts to prefer appellants. After insolvency and before bank-

ruptcy, the bankrupts' estate by reason of their dealings with appellants was enriched to the amount of $2,565.92.

To this extent it presents exactly the same situation found in *Jaquith* v. *Alden*, 189 U. S. 78, in which it was held that where all the goods were sold and delivered after the bankrupt's property had actually become insufficient to pay his debts, his estate was increased in value thereby to an amount in excess of the payments made.

This was not the fact in *Pirie* v. *Chicago Trust Co.*, 182 U. S. 438, in which case, the estate of the insolvent as it existed at the date of insolvency was diminished by the payment.

The attention of the court is directed to the importance that is given to the date of insolvency in these last two cases, as the only method of determining whether or not a particular creditor has obtained a greater percentage of his debt than any other creditor of the same class is to ascertain if during a period of insolvency the bankrupts' estate has been enriched by reason of the transactions in their entirety. The running account between the insolvent and the creditor may be variable, and during insolvency may show at times a diminishing of the estate; but if in the entirety of the transactions the estate is enriched, then the payments are not preferential.

In the case now before the court no sale was made after the payment. It must be remembered it was payment on a running account. The first payment by insolvents was followed by sales, all were within a period of insolvency, and are to be considered as parts of one continuous *bona fide* transaction kept alive by extension of new credits.

The object of the bankrupt act, so far as creditors are concerned, is to secure equality of distribution among them of the property of the bankrupt. Such object could not be secured if there were no provisions against preferences. *Pirie* v. *Chicago Title & Trust Co.*, *supra*. A preference is a transfer of property which enables one of the creditors of a bankrupt to obtain a greater percentage of his debt than any other creditors

of the same class. Where a running account, with no knowledge of insolvency on the part of the creditor, and no intent to prefer, comprised within a period of insolvency, shows a net gain to the estate and a consequent loss to the creditor, that creditor has not been preferred, for that creditor does not receive a greater percentage of his debt than other creditors in the same class.

Mr. Arthur G. Dickson for appellees:

The history of the subject shows that the return of the innocently received preference by subsequent credits was an essential part of the theory which permitted the retention of the payments that had been received by the creditor during insolvency and within four months of bankruptcy. It is true that, in *Jaquith* v. *Alden*, 189 U. S. 78, the sale which was the last of the transactions was not large enough to be by itself a return of the payment just previously received, but it was at least a partial return thereof. Furthermore, the payments and sales were very closely inter-related, so that this court was able to regard all of the transactions as one continuing course of dealing, where payments had had the effect of inducing new sales. In *Jaquith* v. *Alden* there were, first, two sales, then two payments; next three sales, then a payment, and, lastly, a sale. The payments, therefore, kept the account alive and helped to increase the estate by inducing the extension of additional credits.

In the present case, the first sale was paid for and then there followed a number of sales. If the transactions had stopped there, this case would not be before this court. There was, however, a subsequent payment of a part of the account. This payment did not induce any subsequent credits; it was not so intermingled with other payments and sales as to entitle the creditor to ask that it be taken as part of a continuing transaction by which the estate was benefited. Its only effect was to reduce the estate, to take a part of the assets which then belonged to all of the creditors of the bankrupts and to give it to

one of them. No reasoning, however plausible, can rob this payment of that effect and it was, therefore, under the bankruptcy act of 1898, a preference.

The decision of the Circuit Court of Appeals in this case was in accord with its own previous opinion in the case of *Gans* v. *Ellison*, 114 Fed. Rep. 734.

"If, then, a creditor innocently preferred has given return credits afterwards, he has surrendered his preference to the extent of such return credits. To effectuate justice, both sides of the account are to be considered, in the case of a creditor who innocently has received preferences, and afterwards in good faith has given the debtor further credit, without security, for property which has become a part of the debtor's estate." See also *Kimball* v. *Rosenham Co.*, 114 Fed. Rep. 85; *In re Colton Export Co.*, 121 Fed. Rep. 663.

Although Circuit Judge Gray, in delivering the opinion in this case, admitted "that the authorities are not harmonious and do not satisfactorily dispose of the precise question here presented, there is no real difference of opinion between the judges of different circuits. In no case, with the exception of *In re Topliff*, 114 Fed. Rep. 323 (District Court of Massachusetts), has there been a decision enabling a creditor, whose last transaction with the bankrupt during insolvency and within four months of bankruptcy, has been the receipt of a payment, to retain such payment. In every other case in which the creditor has been permitted to retain payments received during insolvency and within the four months' period, those payments have been succeeded by new credits extended to the bankrupt.

For a history of the question herein involved see the following cases: *McKay* v. *Lee*, 105 Fed. Rep. 923; *In re Ryan*, 105 Fed. Rep. 760; *In re Southern Overall Mfg. Co.*, 111 Fed. Rep. 518; *Kahn* v. *Export & Com. Co.*, 115 Fed. Rep. 290; *In re E. O. Thompson's Sons*, 6 A. B. R. 663; aff'd in 7 A. B. R. 214, and *Gans* v. *Ellison*, 114 Fed. Rep. 734; *Peterson* v. *Nash Brothers*, 112 Fed. Rep. 311; *In re Beswick*, 7 A. B. R.

395; *Dickson* v. *Wyman*, 111 Fed. Rep. 726; *Morey Mercantile Co.* v. *Schiffer*, 114 Fed. Rep. 447; *Kimball* v. *Rosenham Co.*, 114 Fed. Rep. 85; *In re Sagor & Bro.*, 121 Fed. Rep. 658; *Jaquith* v. *Alden*, 189 U. S. 78; *Yaple* v. *Dahl-Millikan Grocery Co.*, 193 U. S. 526.

MR. JUSTICE MOODY delivered the opinion of the court.

The appellants, Joseph Wild & Company, offered for proof against the estate of George Watkinson & Company, who had been declared bankrupts, a claim of $2,565.92. The claim was allowed by the referee but disallowed by the District Court, except upon a surrender of an alleged preference of $634.78, which was received within four months of the adjudication. The judgment of the District Court was affirmed by the Circuit Court of Appeals.

The facts of the case are simple. The bankrupt became insolvent on or before January 1, 1901, but the claimants had no knowledge of their insolvency during the running of the account hereafter referred to, and the merchandise therein specified was sold and delivered in the ordinary course of business. The appellants sold and delivered merchandise in various items, beginning February 14, 1901, and ending October 8, 1901. The total price of the merchandise thus delivered was $3,377.28. There were payments on account on June 29 and October 10, amounting to $811.36, leaving the net amount by which the bankrupt estate was enriched $2,565.92. The last payment, on October 10, was $634.78, and was two days after the last sale and delivery of merchandise.

The single question in the case is whether that payment was a preference. It is conceded that it would not be a preference, in view of the other facts in the case, if it had been followed by a sale and delivery of goods of any value, however small. This concession is made necessary by the decision in *Jaquith* v. *Alden*, 189 U. S. 78, which is, in all respects, like the present case, except that two days after the payment, which was al-

leged to be a preference, merchandise of trifling value was sold and delivered to the bankrupt. But the decision in that case was not rested upon the fact of this slight sale subsequent to the last payment. It was rather put upon the broader principle that all the dealings between the creditor and the bankrupt were after the bankrupt's insolvency, and that their net effect was to enrich the bankrupt's estate by the total sales, less the total payments. The majority of the court thought these facts distinguished the case from *Piric* v. *Trust Company*, 182 U. S. 438, though there was a difference of opinion upon that point. But all doubt was resolved in *Yaple* v. *Dahl-Millikan Grocery Co.*, 193 U. S. 526, where the precise question, which is now here, was decided by the court, and it was held, where a creditor has a claim upon an open account for goods sold and delivered during the period of four months before the adjudication in bankruptcy, the account being made up of debits and credits, leaving a net amount due from the bankrupt estate, that payments made under such circumstances did not constitute preferences which the creditor was bound to surrender before proving his claim in bankruptcy.

It follows that the judgment of the Circuit Court of Appeals was erroneous, and it must be

Reversed.